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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

MARC MCGUIRE, Plaintiff, Cross-defendant and Appellant, v. 235 ON MARKET HOMEOWNERS ASSOCIATION, Defendant, Cross-complainant and Respondent.	D053218 Consolidated with D054131 (Super. Ct. No. GIC848551)

APPEAL from a judgment of the Superior Court of San Diego County, Jay M. Bloom, Judge. Affirmed.

Marc McGuire owns a condominium unit in a downtown San Diego building known as "235 On Market." The building is governed by the 235 On Market Homeowners Association (the HOA) and is subject to a written declaration of rules (the CC&R's). About six years ago, the HOA and McGuire began disputing whether a small area of interior floor tile in McGuire's unit violated the CC&R's. McGuire filed a lawsuit against the HOA, and the HOA cross-complained against McGuire. The court ultimately

granted summary judgment in the HOA's favor on the complaint and cross-complaint, and denied McGuire's summary judgment motion on the cross-complaint. The court ordered McGuire to remove the disputed floor tile and replace it with approved floor covering. The court awarded the HOA $225,200 in attorney fees and $12,803.50 in costs.

McGuire appeals, contending the court erred in granting the HOA's summary judgment motion on the cross-complaint and denying his summary judgment motion.[1] McGuire also challenges the amount of attorney fees awarded. We conclude the court properly granted summary judgment in the HOA's favor, and the court did not abuse its discretion in awarding the attorney fees. Accordingly we affirm.

FACTUAL AND PROCEDURAL OVERVIEW

In November 1999, McGuire signed an agreement with 235 Market, LLC ("the Developer") to purchase a condominium unit on the top floor of a four-story, 57-unit residential building under construction. At the time, McGuire worked as a subcontractor on the construction project, installing counter and shower tile in the kitchens and bathrooms.

When McGuire signed the purchase agreement, the Developer gave him a list of 47 written disclosures, each of which was initialed by McGuire. Of relevance here, McGuire agreed to be bound by the CC&R's applicable to the project, and to "comply

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[1] McGuire does not challenge the summary judgment granted in the HOA's favor on his complaint.

with the noise transmission and acoustical guidelines established by the Architectural Committee." Specifically, McGuire acknowledged that the acoustical guidelines "require that Buyer install flooring in all areas of the Property, that Buyer provide the Architectural Committee with specifications for all hard surface flooring materials, and that Buyer shall be prohibited from changing any approved flooring materials without the prior consent of the Architectural Committee." McGuire also acknowledged that the Developer had the right to make changes in the plans and materials as it "deems necessary or desirable . . . ."

About four months after McGuire signed the purchase agreement and disclosure statement, in March 2000, the Developer recorded the CC&R's applicable to the building, and the CC&R's became effective immediately. The CC&R's contained a provision entitled "Floor Covering," which required that "[a]ll floor areas . . . be covered with materials designed and installed for the purpose of minimizing noise transmission above the level designated by the Architectural Committee . . . ," and required an "Owner" to obtain permission from the Architectural Committee before making changes to "approved

flooring materials."[2] It is undisputed that an Architectural Committee was never created and that the Architectural Committee's duties were performed by the HOA's Board of Directors (Board). It was also undisputed that during most of McGuire's escrow period, the Board was composed primarily of Developer representatives because the project was still under construction and the units had not yet been conveyed to individual owners.

About two months after the CC&R's were recorded, on April 28, the Developer's project manager, Elizabeth Cate, sent a letter to McGuire and his former wife, confirming that they did not have the option of changing standard flooring materials for their condominium unit. The letter stated in part: "As you know, the standard flooring features in your home include 'hard surface' tile in the front entry, kitchen, and bath areas, and 'soft surface' carpet throughout the living, dining, bedroom, and dressing areas. I am writing to confirm that these 'hard surface' and 'soft surface' areas must remain consistent

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[2] This provision stated in full: "Floor Covering. All floor areas within the Condominiums shall be covered with materials designed and installed for the purpose of minimizing noise transmission above the level designated by the Architectural Committee and all flooring materials shall conform to the guidelines therefore established by the Architectural Committee. No Owner may alter any approved flooring materials without the prior consent of the Architectural Committee. Notwithstanding the foregoing, any alterations to the approved flooring materials shall be with flooring materials which the Architectural Committee in its sole discretion determines to be acoustically equivalent or better than the flooring materials being altered. It shall be the responsibility of individual Unit Owners to insure that they comply with the requirements and restrictions set forth herein. Failure on the part of an Owner of a Unit to insure that flooring material and installation procedures adhere to these requirements and restrictions shall subject the Owner to penalties which shall include removal, at said Owner's expense, of any flooring material that is in violation of the requirements and restrictions set forth herein."

with any flooring options that you may select. [¶] After extensive feasibility research on flooring materials, our acoustical engineer has concluded that 'hard surface' and 'soft surface' products will not be interchangeable. Therefore, we unfortunately cannot accept selections for 'hard surface' flooring product in the living, dining, bedroom, and dressing areas. These flooring requirements are due to the acoustical code constraints for the 235 On Market building type." Neither McGuire nor his former wife remembered receiving a copy of this letter, but the evidence showed the letter was sent under standard postal procedures to an address McGuire provided and where he had received other correspondence, and the letter was never returned.

About one year later, while McGuire's escrow was still pending and construction was ongoing, McGuire obtained the Developer's approval to perform custom work in his own unit, including installing custom cabinets and granite counter tops, and installing his own flooring. With respect to the flooring, McGuire made the decision to put tile flooring in an area where the standard plans called for carpet. He installed at least three

feet, nine inches of tile that had not been in the standard plans.[3] He did not obtain the Developer's prior approval for the precise location of the installed tile.

At some point, the Developer learned of the additional tile work, and there were numerous conversations among individuals in the Developer's construction office about whether this expansion was or would be approved. Eventually, the Developer agreed to close escrow despite the location of the tile. Shortly thereafter, in August 2001, escrow closed on McGuire's unit.

At some unspecified time after that, McGuire's downstairs neighbor complained repeatedly about the sound of high-heeled shoes on tile floor in McGuire's unit. When the problem was not resolved, the neighbor lodged a complaint with the HOA, claiming that McGuire had placed tile flooring in areas "beyond the original installation." In November 2002, the HOA sent a letter to McGuire, informing him of the complaint, and scheduled a hearing for the next month.

After the hearing, on January 22, 2003, the Board determined McGuire had violated the CC&R's Floor Covering provision by installing "three feet and nine inches"

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[3] Before the lawsuit was filed, the documents referred to the size of the disputed tile as being about "three feet and nine inches" in size, without specifying whether this measurement refers to square feet or merely the length of the area. Later, during the summary judgment proceedings, McGuire submitted his expert's declaration in which the expert said he understood the "dispute[d]" area to be 40 square feet in size, and McGuire never corrected this statement. Because of conflicts in the record and appellate briefs, we asked the parties to file supplemental briefs to clarify the size of the disputed tile area. Those briefs did not resolve the discrepancy. But for purposes of this appeal, the record shows the Board expressly found the unapproved tile area to be "three feet and nine inches," and the parties apparently agree this tile extends from the kitchen into a portion of the dining area. In any event, our resolution of this appeal is not dependent on the exact size or location of the disputed tile.

of tile in an area intended for carpet in the "original building plans" without "first applying for and obtaining the prior consent of the Board of Directors, acting as the Architectural Committee." The Board also found that McGuire failed to show the "expanded hard surface areas are acoustically equivalent or better than the original flooring materials which were altered (i.e. carpet) . . . ." The Board imposed a $50 fine and ordered McGuire to remove the disputed tile, unless McGuire provided the Board with written documentation by February 17, 2003 from a licensed acoustical engineer that the expanded hard surface area is "acoustically equivalent to, or better" than "the flooring originally intended (i.e. carpet)."

Several weeks later, McGuire sent a letter to the Board objecting to its determination, stating: "I am . . . confused with the findings that I had gone ahead and expanded my hard surfaces without applying for and obtaining prior consent of the Board. This statement just simply is not true. My floors were installed before the close of escrow, and as I felt there was not an issue, why would I petition to the Board to expand my hard surfaces?" McGuire thereafter declined to remove the tile flooring or provide the Board with any additional acoustical information about the tile.

Four months later, the HOA served McGuire with a formal request for alternative dispute resolution. The parties attempted to mediate the dispute in August 2004, but the mediation was unsuccessful.

McGuire then refused the HOA's requests to submit the matter to arbitration and instead filed a superior court complaint against the HOA, seeking a declaration that the CC&R's arbitration provision violated public policy and applicable statutes. As

amended, the complaint alleged the CC&R's Floor Covering provision was "unreasonable" and "is being enforced arbitrarily and unreasonably" and the HOA breached a fiduciary duty and the covenant of good faith by enforcing the CC&R's in a discriminatory manner.

In response to the complaint, the HOA reiterated its arbitration demand, but also filed a cross-complaint. In the cross-complaint, the HOA alleged McGuire violated the Floor Covering provision by taking "advantage of his . . . access to the [project] as a retained contractor . . . and install[ing] unapproved tile flooring in the [property] (prior to the close of escrow), in an area originally designed and intended to be installed as carpet and pad floor covering, without prior approval of [the] Board of Directors/Architectural Committee." The HOA sought declaratory relief and a permanent injunction requiring McGuire to remove the tile flooring and install floor covering approved by the Board.

The HOA then moved for summary judgment on McGuire's complaint. In support, the HOA presented evidence that the Floor Covering restriction was reasonable and not arbitrary, and that the HOA had fairly enforced all violations of the provision against all owners. The court granted the motion, finding the HOA met its burden to establish McGuire could not recover on his claims as a matter of law, and McGuire's responsive evidence did not show a material triable issue of fact. McGuire appealed, but this court dismissed the appeal, finding it was premature because the parties had not yet litigated the HOA's cross-complaint.

Each party then brought a summary judgment motion on the cross-complaint. After the parties submitted memoranda and voluminous supporting materials (the

relevant portions of which are discussed below), the court granted the HOA's summary judgment motion and denied McGuire's summary judgment motion.

The court thereafter issued a judgment ordering McGuire to: (1) "remove the unapproved hard surface tile flooring . . . installed in an area specifically designed and intended to be installed with carpet and floor pad covering and which the Board previously determined was in violation of the CCRs"; and (2) "replace the unapproved hard surface tile flooring with Board of Directors/Architectural Committee approved floor covering which has been determined . . . to be acoustically equivalent to or better than the flooring materials which were specifically designed for the area." The court determined the HOA was the prevailing party on the complaint and cross-complaint and awarded the HOA $225,200 in attorney fees and $12,803.50 in costs.

DISCUSSION

I. *Review Standards*

Summary judgment is properly granted when there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) "[T]he party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if [the party] carries [this] burden of production, [the party] causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact. . . ." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850-851.) Although the burden of

production shifts, the moving party always bears the burden of persuasion. (*Id.* at p. 850.)

We review the trial court's decision de novo, considering all of the evidence offered in connection with the motion. (*Shin v. Ahn* (2007) 42 Cal.4th 482, 499; *Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990, 1003.) In doing so, we apply the same three-step analysis required of the trial court. (*Bono v. Clark* (2002) 103 Cal.App.4th 1409, 1431.) After identifying the issues framed by the pleadings, we determine whether the moving party has established facts justifying judgment in its favor. If the moving party has carried its initial burden, we then decide whether the opposing party has demonstrated the existence of a triable, material fact issue. (*Id.* at p. 1432.) We strictly construe the moving party's evidence and liberally construe the opposing party's evidence without weighing the evidence or conflicting inferences. (*Aguilar, supra,* 25 Cal.4th at p. 856; Code Civ. Proc., § 437c, subd. (c).)

II. *HOA's Summary Judgment Motion on its Cross-Complaint*

Each of the three causes of action alleged in the HOA's cross-complaint is premised on the allegation that McGuire breached the CC&R's by installing the disputed tile without obtaining approval from the HOA's Board. Specifically, the HOA alleged McGuire violated the Floor Covering restriction in the CC&R's by installing "unapproved tile flooring . . . in an area originally designed and intended to be installed as carpet and pad floor covering, without prior approval of [the] Board of Directors/Architectural Committee."

In moving for summary judgment on these claims, the HOA produced evidence that the Developer made a decision during the construction process that hard surface flooring would not be permitted in the upper units, except in the kitchen and bathroom areas, because of acoustical concerns. The HOA also produced evidence that project manager Cate communicated this decision to McGuire by a letter in April 2000. Further, the HOA submitted evidence that McGuire made his own decision as to where to place the tile, did not obtain prior approval from the Developer or the Board as to the location of the tile placement, and did not follow the guidelines set forth in the Cate letter. Specifically, McGuire admitted he "snapped the lines" without reference to the Developer's original specifications, without reference to the Cate flooring letter, and without reference to the HOA's recorded CC&R's. The HOA additionally submitted the declaration of Jim Easterling, one of the Developer's construction managers, and the deposition testimony of project manager Cate, who each denied giving permission to McGuire to expand the tile on his floors.

This evidence met the HOA's summary judgment burden to establish McGuire was in violation of the CC&R's by placing tile in an area that was not approved by the Board (or the Developer) for purposes of meeting acoustical standards. The undisputed evidence shows the CC&R's were in effect when McGuire installed his flooring. The CC&R's Floor Covering provision required the condominium floor area to "be covered with materials designed and installed for the purpose of minimizing noise transmission above the level designated by the Architectural Committee and all flooring materials shall

conform to the guidelines therefore established by the Architectural Committee."[4] Under this provision, the original flooring in each condominium unit was required to be installed "*for the purpose* of minimizing noise transmission" consistent with guidelines established by the Board (and/or the Developer). (Italics added.) In moving for summary judgment, the HOA presented evidence that McGuire violated this provision because he failed to comply with the acoustical standards established by the Developer as explained in the Cate letter. The burden thus shifted to McGuire to present facts showing that his tile installation was in compliance with the CC&R's.

In attempting to meet this burden, McGuire relied on his deposition testimony that various representatives of the Developer had given him permission to place tile in locations that had not been permitted by the Cate letter.

First, he relied on his deposition testimony that he had obtained permission from a man named "Mike," who was one of the Developer's superintendents. However, during his deposition, McGuire later said he was not sure that Mike was the person who approved the request with respect to the specific location of the tile and at one point denied that he obtained the specific permission from Mike.

Second, McGuire testified that he might have obtained permission from Easterling, the Developer's construction manager, but he produced no evidence that Easterling had the authority to approve any alterations to the approved plans. McGuire

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4 Although there was no Architectural Committee in existence at the time, the HOA's Board existed and acted as the Architectural Committee, and it is undisputed that this Board was essentially controlled by the Developer.

also later acknowledged that he did not remember and was not sure who gave him permission pertaining to the tile floors.

McGuire also relied on his deposition testimony about the statements and conduct of Keith Fernandez, the Developer's executive vice president, on the day McGuire received keys to the unit. In his deposition, McGuire testified that when he arrived at his condominium unit to pick up his keys in August 2001 (at about the time escrow closed), the Developer representatives did not want to give him his keys because he had installed tile in an area where carpet was originally intended. When McGuire insisted he had permission for the tile placement, the Developer representatives took McGuire to see their supervisor, Fernandez, who had the express authority to approve modifications to the design standards, including flooring materials. When they arrived at Fernandez's office, McGuire told Fernandez he had permission to place the tile in the disputed area, and identified the location of the tile. Fernandez responded by telling the employees to give McGuire his keys. According to McGuire, Fernandez said: "That's fine. Give the gentleman his keys."[5]

McGuire additionally relied on the deposition testimony of Deborah Fox, the Developer's construction administrator, who testified that before McGuire's escrow closed "everybody" in the construction office "was talking about" the "hard versus soft" surface flooring issue pertaining to McGuire's unit. She said she recalled having a

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5 The HOA contends Fernandez's statement is inadmissible hearsay. The trial court overruled the objection in the proceedings below. For purposes of this appeal, we assume the court did not abuse its discretion in overruling the hearsay objection.

conversation with McGuire about the issue, "and it was just something we had a conversation about because *everybody was talking about it in the construction office*." (Italics added.) Fox said "I knew [McGuire] had extended it beyond what he was supposed to and . . . there are certain reasons why the [tile] flooring . . . cannot be extended into the living surface, and accousticwise, yeah, I knew it would be a problem. I mean, that's why you have certain areas that have to be hard surfaces and certain areas that have to be soft." When asked whether she recalled having a conversation with McGuire about the tile, Fox responded: "For quite a while it was a tug of war in the office. You know, how it panned out, how it ended up that . . . his hard surface could remain, I don't know. But he would say he had approval, then I'd hear from the office that he didn't, and how it all worked out I don't know."

McGuire contends this evidence created a triable issue of fact concerning whether the Developer had granted permission for him to customize his unit and place the tile flooring in the disputed areas. The argument fails for several reasons.

First, the evidence was speculative. An opposition to summary judgment will be deemed insufficient when it is based on conjecture and speculation. (*Wiz Technology, Inc. v. Coopers & Lybrand LLP* (2003) 106 Cal.App.4th 1, 11.) McGuire's deposition testimony about receiving permission from "Mike" or Jim Easterling was contradicted by his later admission that he could not remember who gave him permission. A plaintiff cannot create an issue of fact by relying on contradictions in his own testimony. (See *Benavidez v. San Jose Police Dept*. (1999) 71 Cal.App.4th 853, 860-863.)

Likewise, McGuire's testimony about Fernandez's statement "[g]ive him the keys" was insufficient to show a disputed factual issue on the permission issue. The fact that Fernandez authorized his employees to give McGuire the keys to his unit does not support a reasonable inference that Fernandez approved the location of the tile flooring. Even if there was an ongoing debate about McGuire's floor tile, the logical link between McGuire's receiving his keys at escrow closing and an express permission to violate the established floor covering rules is too attenuated to create a triable factual issue on the question of whether McGuire complied with the CC&R's rules. This is particularly true because there was no evidence that Fernandez had any right to withhold the keys. There is nothing in the record showing the seller had the legal authority to prolong escrow if the buyer's unit was not in compliance with the CC&R's. To the contrary, in the November 1999 disclosure statement, McGuire had agreed that any necessary corrective work to be performed by the Developer would not delay the close of escrow. Thus, even though corrective work may have been necessary to remedy McGuire's placement of the tile, the Developer was contractually obligated to allow escrow to close.

Moreover, even assuming we could construe the Developer's knowledge of the tile placement and Fernandez's cryptic statement about the keys as implicit permission, this evidence is insufficient to show the tile placement complied with the CC&R's provision. As noted, the CC&R's required that any floor covering placed in the condominium units be "*designed and installed for the purpose of minimizing noise transmission above the level designated by the Architectural Committee . . . .*" (See fn. 2, *ante*; italics added.) Under this plain language, the Floor Covering provision did not provide the Developer

with unlimited discretion to permit a purchaser to install any type of flooring materials in the units. Instead, the Developer complied with the CC&R's only if the approval was consistent with standards developed for the purpose of minimizing acoustical problems. Thus, even if Fernandez had impliedly approved the floor covering at escrow closing, this approval would not constitute compliance with the CC&R's unless the evidence showed the Developer considered the tile an appropriate floor material *with respect to a standard of acceptable noise transmission*. There was no such showing in this case. Instead, the undisputed evidence supports only a contrary conclusion—that the approval (if any) came at the spur of the moment when the Developer representatives were transferring ownership to McGuire. By failing to show the Developer's approval was made in conjunction with a determination that the flooring would satisfy minimum acoustical standards, McGuire's evidence was insufficient to show the requisite approval.

McGuire argues the CC&R's flooring restrictions applied only to an "Owner," and when he installed the tile flooring, he was not yet an Owner. This argument misreads the CC&R's. The Floor Covering provision concerns an "Owner" only in the second through fifth sentences of the clause. (See fn. 2, *ante.*) These sentences govern the situation when an "Owner" seeks to make an "alteration" to an "approved" flooring. In such situation, the "Owner" must obtain approval from the Architectural Committee (i.e., the Board) before any alterations can be made. We agree with McGuire that these provisions were inapplicable because McGuire installed the flooring before he became an Owner. But the first sentence of the CC&R's provision plainly applies regardless of when the flooring is installed because it sets forth the standard applicable to the *initial* design and

installation of the flooring materials. This portion of the provision mandates that "All floor areas . . . be covered with materials *designed and installed* for the purpose of minimizing noise transmission above the level designated by the Architectural Committee [Board] . . . ." (See fn. 2, *ante,* italics added.) The Developer and McGuire were required to comply with this provision, regardless of the stage at which the flooring was installed.

In a related argument, McGuire argues that the CC&R's were not effective on the date he installed the flooring. He relies on the CC&R's definition of the "First Conveyance Date," which is the date the Developer conveys the first condominium in the project to a buyer. The evidence established that the Developer conveyed the first condominium unit three or four days before escrow closed on McGuire's unit. However, there is nothing in the CC&R's showing that the use provisions of the CC&R's are not effective before the First Conveyance Date. To the contrary, the CC&R's expressly state that the provisions take effect on "the date this Declaration is recorded," which occurred on March 2000, several months before McGuire installed the tile.

In this regard, we are unpersuaded by McGuire's reliance on the fact that the original flooring plan referred to in Cate's letter was never recorded. Although we agree that the Developer was not necessarily bound by its original design plan, under the CC&R's a prospective purchaser could not merely make his or her own decisions as to the floor materials, but was required to obtain a determination from the Developer and/or Board that the installed flooring materials met the established acoustical standards.

McGuire also argues the Cate letter cannot be used to support the HOA's claims because he produced evidence that neither he nor his wife received this letter. In her declaration, Cate said the April 28 letter was sent to McGuire at the address where she sent other purchase documents, and the letter was never returned. This evidence was sufficient to meet the HOA's summary judgment burden, and McGuire did not present any evidence affirmatively showing the letter was not received by him. At his deposition, McGuire testified that he could not remember whether he received the letter, but he did not deny that he might have received it. Similarly, McGuire's wife said only that she did not recall receiving the letter. In any event, it was undisputed that McGuire had actual notice that he was subject to the CC&R's Floor Covering provision. In November 1999, McGuire signed the disclosure statement notifying him that he was bound to comply with the rule that all floor areas "be covered with materials designed and installed for the purpose of minimizing noise transmission above the level designated by the Architectural Committee . . . ," and that an "Owner" must obtain permission before making changes to "approved flooring materials."

McGuire also suggests there was a factual dispute as to the validity of Cate's statement that the Developer's flooring decision was based on "extensive" acoustical research. McGuire argues this statement was unreasonable because it was based "only" on a report by Jeffrey Fuller, a senior acoustician employed by a civil engineering firm. This argument does not show the Developer's acoustical standards were inappropriate or create a triable issue of fact on any material issue in the case. The question of the reasonableness of the acoustical standards was resolved in the first summary judgment on

McGuire's complaint, and McGuire has acknowledged he has not appealed from that ruling. Moreover, as McGuire recognizes in his appellate briefs, the deferential "'business judgment rule' insulates management decisions made in good faith, in what is believed to be the organization's best interest," citing *Lamden v. La Jolla Shores Clubdominium Homeowners Assn*. (1999) 21 Cal.4th 249. Under this rule, a court must give substantial deference to the Developer's decision as to the appropriate acoustical standards. The fact that McGuire does not agree with the acoustical standards or does not believe the Developer performed sufficient research to support its conclusion as to the appropriate standards did not preclude a finding that McGuire violated the CC&R's.

McGuire additionally argues he did not violate the Floor Covering provision because his expert opined that McGuire's flooring was "'acoustically equivalent'" to the City of San Diego's minimum noise transmission standards. However, because this expert did not test the carpet and pad flooring required by the Developer's original plans and specifications, the expert had no foundation to opine that McGuire's tile flooring was acoustically equivalent to the intended carpet and pad. Moreover, the expert's opinion produced in the summary judgment proceedings was insufficient to show the Board could not enforce the CC&R's provision against McGuire. The Board provided McGuire with substantial opportunity to show that the tile was acoustically equivalent to the required soft surface materials, and he made no effort to do so.

McGuire also argues the HOA unreasonably delayed its enforcement of the CC&R's. McGuire waived this argument by failing to cite to relevant facts in the record (other than the date the HOA first took enforcement action against him) and applicable

legal authority. An argument is waived if the appellant does not present supporting argument or authority other than a passing reference in his or her appellate brief. (See *Dills v. Redwoods Associates, Ltd.* (1994) 28 Cal.App.4th 888, 890, fn. 1; *In re Marriage of Schroeder* (1987) 192 Cal.App.3d 1154, 1164.)

III. *The Court's Remaining Rulings*

McGuire additionally contends the court erred in denying his summary judgment motion on the cross-complaint. However, based on our conclusion that the court properly granted the HOA's summary judgment motion on the cross-complaint, we necessarily conclude the court properly found in the HOA's favor on McGuire's summary judgment motion on the same pleading.

IV. *Attorney Fees*

McGuire contends the court's award of $225,200 in attorney fees to the HOA is excessive and constituted an abuse of discretion.

At first glance, we would agree that this award seems disproportionate to the result obtained in this case (the HOA is now able to enforce its order that McGuire remove three feet and nine inches of tile from the interior of his unit). However, the trial court was familiar with this litigation which began in June 2005 and the court presided over the numerous hearings during a three-year period. The appellate record contains 16 volumes of records, and the appellant's appendix alone has 4,026 pages. There were two sets of summary judgment motions, and cross-summary judgment motions on the cross-complaint. Throughout the proceedings, McGuire asserted numerous legal and factual issues in an attempt to avoid removing three feet of tile in his condominium, from broad

constitutional claims to very narrow factual assertions. None of these contentions were found to have merit, but the HOA was required to respond to each motion and court appearance.

A trial court has broad discretion in determining a reasonable amount of attorney fees. (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095.) In reviewing an order granting fees, we must uphold the trial court's determination on the appropriate amount of the award unless it is shown that the court was "'clearly wrong.'" (*Ibid.*) "'The "experienced trial judge is the best judge of the value of professional services rendered in his [or her] court. . . ." [Citations.]'" (*Ibid.*; *Graciano v. Robinson Ford Sales, Inc.* (2006) 144 Cal.App.4th 140, 148-149.) "'"The only basis for reversal would be that the amount was so large . . . as to 'shock the conscience' and suggest that passion and prejudice influenced the determination . . . ." [Citation.]' [Citation.]" (*Reveles v. Toyota by the Bay* (1997) 57 Cal.App.4th 1139, 1153, disapproved on other points in *Gavaldon v. DaimlerChrysler Corp.* (2004) 32 Cal.4th 1246, 1261 and *Snukal v. Flightways Mfg., Inc.* (2000) 23 Cal.4th 754, 775, fn. 6.) Thus, "in the absence of a clear abuse of discretion, we must defer to the judgment of the trial court . . . ." (*Avikian v. WTC Financial Corp.* (2002) 98 Cal.App.4th 1108, 1119.)

Here, the HOA's counsel (two different law firms) submitted declarations generally explaining the services rendered, along with detailed billing statements that described each service rendered, the time expended and the hourly rate. This documentation revealed that attorney Laura Kwiatkowski initially represented the HOA in defending against McGuire's complaint and in affirmatively prosecuting the cross-

complaint. She requested total fees of approximately $220,000 at an hourly rate ranging from $160 in 2005 to $185 in 2008. The documentation also showed that Borton Petrini, LLP took over the defense as insurance defense counsel and assisted in some work associated with the cross-complaint. The firm requested approximately $115,000 at a rate of $200 per hour. The trial court reviewed these documents, considered McGuire's opposing documents, heard oral argument on the matter and, after careful review, determined that the hourly rates were reasonable, and the HOA was entitled to a total fee award of $225,200. Because the court regarded some of the legal fees to be duplicative and/or unnecessary, the court reduced the HOA's request by approximately 33 percent.

In arguing the award was "outrageous," McGuire challenges the fees incurred in the HOA's first summary judgment motion on McGuire's complaint and argued this motion was "completely unnecessary . . . ." However, the motion resulted in an order dismissing McGuire's complaint alleging the HOA violated its fiduciary duty and breached a covenant of good faith, and in which he sought to invalidate the HOA's floor covering restrictions as arbitrary and unreasonable. The motion to obtain this ruling was not unnecessary or futile.

With respect to the cross-complaint, McGuire points out a few items that he believes were unnecessary, such as the HOA's objections to his evidence and the HOA's objections to his taking depositions of the HOA's experts. However, the court was familiar with the litigation, and did not award the HOA its total claimed attorney fees. There is nothing in the appellate record showing the court abused its discretion in

determining the fees awarded reflected services that were reasonable under the circumstances.

"[A]n experienced trial judge is in a much better position than an appellate court to assess the value of the legal services rendered in his or her court, and the amount of a fee awarded by such a judge will therefore not be set aside on appeal absent a showing that it is manifestly excessive in the circumstances." (*Children's Hospital & Medical Center v. Bontá* (2002) 97 Cal.App.4th 740, 782.) We find no abuse of discretion in this award.

DISPOSITION

We affirm the judgment. The parties to bear their own costs on appeal.

HALLER, J.

WE CONCUR:

BENKE, Acting P. J.

MCINTYRE, J.